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11 UNITED STATES OF AMERICA

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA, ) CR 05-578 (B) -JFW  
16 Plaintiff, ) GOVERNMENT'S TRIAL MEMORANDUM  
17 v. ) Trial Date: August 18, 2009  
18 HORACIO YEPIZ, ) Trial Time: 8:30 a.m.  
19 Defendant. )  
20 )  
21 )  
22 )

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23 I.

24 STATUS OF CASE

25 Trial is set for August 18, 2009, at 8:30 a.m.,  
26 before the Honorable John F. Walter, United States District  
27 Judge.

28 The estimated time for presentation of the government's

1 case-in-chief is approximately six days. In accordance with  
2 the Court's order, the government has filed a copy of its  
3 witness list.

4 Trial by jury has not been waived. In addition, the  
5 government is filing a proposed summary of the indictment.

6 II.

7 CASE SUMMARY

8 On August 18, 2009, the government will proceed as to the  
9 sole remaining defendant in the case, Horacio Yepiz, also  
10 known as ("aka") Alberto Rodriguez, aka Horse. The government  
11 previously proceeded to trial on August 9, 2006 against  
12 defendants Rafael Yepiz, Arnold Sandoval, Manuel Yepiz,  
13 Mariano Meza, Jesus Contreras, Gilberto Carrasco, Ruben  
14 Medina, Joe Rangel, Ernesto Orozco Mendez, Francisco Zambrano,  
15 Sergio Mejia, Jose Luis Mejia, and Hilda Yepiz in connection  
16 with the 78-count First Superseding Indictment. Prior to the  
17 August 9, 2006 trial, a number of defendants plead guilty and  
18 the Court severed three death-eligible defendants. These  
19 three defendants plead guilty before trial.

20 The 29-count Second Superseding Indictment (hereinafter,  
21 the "Indictment") charges numerous crimes including Racketeer  
22 Influenced and Corrupt Organizations ("RICO"), RICO  
23 conspiracy, Violent Crimes in Aid of Racketeering charges,  
24 narcotics conspiracy, substantive narcotics offenses, firearms  
25 offenses, murder in furtherance of racketeering and drug  
26 trafficking activities, accessory after the fact, money  
27 laundering, and criminal forfeiture. Given that only the  
28 remaining defendant is on trial at this time, the government

1 will proceed on only the following five counts of the Second  
2 Superseding Indictment: Count One (Racketeering Acts One,  
3 Four, and Seven), Count Two, Count Three, Count Five and Count  
4 Twenty-Four.

5 These charges stem from defendant's membership in a  
6 violent criminal street gang known as the Vineland Boys Gang  
7 (hereinafter, the "VBS Enterprise"), which operates in the  
8 Central District of California and elsewhere. The Indictment  
9 sets forth defendant's illegal activities in furtherance of  
10 the VBS Enterprise and a related drug conspiracy from 1992  
11 until November 30, 2005. At trial, the government will prove  
12 that the VBS Enterprise engaged in, among other things,  
13 murder, conspiracy to commit murder, conspiracy to traffic in  
14 narcotics, and narcotics trafficking.

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## CHARGES, STATUTES, AND ELEMENTS

A. Count One - RICO [18 U.S.C. 1962(c)]

18 Count One charges a violation of the RICO statute, 18  
19 U.S.C. § 1962(c). Count One charges defendant with violating  
20 the RICO statute by being a member or associate of a RICO  
21 enterprise (the VBS Enterprise), and with directing or  
22 participating in the conduct of that enterprise through a  
23 pattern of racketeering activity. The indictment alleges  
24 twenty-one Racketeering Acts as part of that pattern of  
25 racketeering activity. At trial, the government will proceed  
26 as to only Racketeering Acts One, Four and Seven in Count One.  
27 Racketeering Act One charges defendant with Conspiracy to  
28 Distribute and Manufacture Narcotics. Racketeering Act Four

1 charges defendant with Possession with Intent to Distribute  
2 Cocaine. Racketeering Act Seven charges defendant with  
3 Conspiracy to Murder Eugenio Cruz and the Murder of Eugenio  
4 Cruz.

5 In order to be found guilty of RICO, as charged in Count  
6 One, the government must prove the following elements: (1)  
7 there was an enterprise consisting of a group of persons  
8 associated together for a common purpose of engaging in a  
9 course of conduct; (2) the defendant was employed by or  
10 associated with the enterprise; (3) the defendant conducted or  
11 participated, directly or indirectly, in the conduct of the  
12 affairs of the enterprise through a pattern of racketeering  
13 activity or collection of unlawful debt; and (4) the  
14 enterprise engaged in, or its activities in some way affected  
15 commerce between one state and another state or between a  
16 state or the United States and a foreign country. See Ninth  
17 Circuit Model Jury Instruction 8.16 (2003).

18 B. Count Two - RICO Conspiracy [18 U.S.C. § 1962(d)]

19 Count Two charges a violation of the RICO conspiracy  
20 statute, 18 U.S.C. § 1962(d). In order to be found guilty of  
21 this crime, the government must prove the following elements:  
22 (1) there was an enterprise, as previously defined, (2) the  
23 enterprise engaged in, or its activities affected, interstate  
24 or foreign commerce; (3) the defendant was associated with the  
25 enterprise; and (4) the defendant knowingly and intentionally  
26 entered into an agreement to conduct, or participate in the  
27 conduct of, the affairs of the enterprise through a pattern of  
28 racketeering activity, that is the defendant must have agreed

1 that at some time during the life of the conspiracy he or some  
2 other member or members of the conspiracy would commit, on  
3 behalf of the conspiracy, at least two related acts of  
4 racketeering as defined below. See United States v.

5 Fernandez, 388 F.3d 1199, 1231 (9th Cir. 2004); United States  
6 v. Shryock, 342 F.3d 948, 987 (9th Cir. 2003); United States  
7 v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993); Baumer v.  
8 Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993); United States v.  
9 Tille, 729 F.2d 615, 619 (9th Cir. 1984); United States v.

10 Brooklier, 685 F.2d 1208, 1216 (9th Cir. 1982).<sup>1</sup>

11 C. Count Three - Narcotics Conspiracy [21 U.S.C. § 846]

12 Count Three charges a narcotics conspiracy in violation  
13 of 21 U.S.C. § 846. The objects of the conspiracy as to which  
14 the government will proceed at trial are as follows: (1) distribute at least five kilograms of a mixture or substance  
15 containing a detectable amount of cocaine, a schedule II  
16 narcotic drug controlled substance; (2) manufacture at least  
17 50 grams of a mixture or substance containing a detectable  
18 amount of cocaine base (crack), a schedule II narcotic drug  
19 controlled substance; and (3) distribute at least 500 grams of  
20 a mixture or substance containing a detectable amount of  
21 methamphetamine, or at least 50 grams of actual  
22 methamphetamine, a schedule II controlled substance.

23 The essential elements of a drug conspiracy are: (1) an  
24 agreement between two or more persons to commit at least one

25  
26  
27  
28 <sup>1</sup> There is no Ninth Circuit Model jury instruction for  
RICO Conspiracy. However, the stated elements are consistent  
with the caselaw and in past cases in this district juries have  
been instructed on these elements for 18 U.S.C. § 1962(d).

1 of the objects of the conspiracy as charged in the indictment;  
2 and (2) the defendant became a member of the conspiracy  
3 knowing of at least one of its objects and intending to help  
4 accomplish it. See Ninth Circuit Model Jury Instruction 8.16  
5 (2003); United States v. Mesa-Farias, 53 F.3d 258, 260 (9th  
6 Cir. 1995); United States v. Litteral, 910 F.2d 547, 550 (9th  
7 Cir. 1990).<sup>2</sup>

8 D. Count 5 - VICAR [18 U.S.C. § 1959(a)]

9 Defendant is charged in Count Five with Violent Crime in  
10 Aid of Racketeering ("VICAR") for the murder of Eugenio Cruz,  
11 in violation of California Penal Code, Sections 31 and 187,  
12 and 18 U.S.C. § 1959(a).

13 In order to be found guilty of violating Title 18, United  
14 States Code, Section 1959(a), the following must be true: (1)  
15 the enterprise alleged in the Indictment existed; (ii) the  
16 enterprise affected interstate or foreign commerce; (iii) the  
17 defendant must have committed the violent crime specified in  
18 the particular count; and (iv) the defendant must have  
19 committed the crime for the purpose of gaining entrance to, or  
20 maintaining or increasing his position in, or for the purpose  
21 of receiving money from the enterprise. See 18 U.S.C. § 1959;  
22 United States v. Bracy, 67 F.3d 1421, 1429-30 (9th Cir. 1995);  
23 United States v. Vasquez-Velasco, 15 F.3d 833, 842 (9th Cir.  
24 1994).<sup>3</sup>

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26       <sup>2</sup> The government will file a special verdict form in this  
27 matter which will require that if the jury finds the defendant  
28 guilty of any one of the charged controlled substances offenses,  
the jury must make additional findings as to drug quantity.

3       <sup>3</sup> There is no Ninth Circuit Model Jury Instruction for  
VICAR.

1 E. Count 24 - Using or Carrying a Firearm During a Crime of  
2 Violence [18 U.S.C. §§ 924(c) (1) (A) (ii) and (iii),  
2 (j)(1)]

3 Defendant is charged in Count Twenty-Four with using and  
4 carrying a firearm, during and in relation to a crime of  
5 violence, namely Violent Crime in Aid of Racketeering, as  
6 alleged in Count Five of the Indictment, in violation of 18  
7 U.S.C. § 924(c). Count Twenty-Four further alleges that  
8 defendant brandished and discharged that firearm, and caused  
9 the death of a person through the use of the firearm in  
10 circumstances constituting murder as defined in Title 18,  
11 United States Code, Section 1111.

12 In order to be guilty of this offense, the government  
13 must prove: (1) the defendant committed the underlying crime  
14 of violence as charged in the indictment; (2) the defendant  
15 knowingly used, carried, possessed, brandished, or discharged  
16 a firearm; and (3) the defendant did so during and in relation  
17 to the underlying crime of violence.<sup>4</sup> See Ninth Cir. Model  
18 Jury Instruction 8.65 (2003).

19 IV.

20 DEFINITIONS

21 A. RICO DEFINITIONS

22 1. "Enterprise"

23 An "enterprise" includes any individual, partnership,  
24 corporation, association, or other legal entity, and any union  
25

26 <sup>4</sup> Section 924(c) provides for different penalties  
27 depending upon whether the firearm was brandished, or  
28 discharged. 18 U.S.C. § 924(c). As such, the special verdict  
form which the government submits will ask the jury to make  
findings as to whether defendant brandished or discharged the  
firearm.

1 or group of individuals associated in fact although not a  
2 legal entity. See 18 U.S.C. § 1961(4).

3 2. "Racketeering Activity"

4 "Racketeering activity" includes any act or threat  
5 involving murder, kidnaping, robbery, extortion, or dealing in  
6 a controlled substance or listed chemical, which is chargeable  
7 under state law and punishable by imprisonment for more than  
8 one year.

9  
10 3. "Pattern of Racketeering Activity"

11 A "pattern of racketeering activity" is at least two  
12 racketeering acts within ten years of each other. See 18  
13 U.S.C. § 1961(5). In order to form a "pattern," these two  
14 acts must be related to each other and pose a threat of  
15 continuing activity. H.J. Inc. v. Northwestern Bell Telephone  
16 Co., 109 S. Ct. 2893, 2900-02 (1989); United States v.  
17 Fernandez, 388 F.3d 1199, 1221 (9th Cir. 2004), cert. denied,  
18 544 U.S. 1009 (2005).

19 V.

20 PERTINENT LAW

21 A. LAW RELATING TO RICO

22 1. Enterprise

23 In order to establish the existence of an  
24 associated-in-fact enterprise, the government must submit  
25 proof that the Vineland Boys Gang constituted "a group of  
26 persons associated together for a common purpose of engaging  
27 in a course of conduct." United States v. Turkette, 452 U.S.  
28 576, 583 (1981). As recently articulated by the United States

1 Supreme Court, "an association-in-fact enterprise must have at  
2 least three structural features: a purpose, relationships  
3 among those associated with the enterprise, and longevity  
4 sufficient to permit these associates to pursue the  
5 enterprise's purpose." Boyle v. United States, No. 07-1309,  
6 6-7 (June 8, 2009).

7 The existence of an enterprise is a separate element that  
8 must be proved. The existence of an enterprise, however, may  
9 be inferred from the evidence showing that persons associated  
10 with the enterprise engage in a pattern of racketeering  
11 activity. Id. at 8.

12 RICO reaches peripheral figures as well as the central  
13 insiders in the enterprise. United States v. Tille, 729 F.2d  
14 615, 620 (9th Cir. 1984).

15 2. Effect on Interstate Commerce

16 The courts have held that a slight effect on interstate  
17 commerce is all that is required for a RICO violation. United  
18 States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979). In fact,  
19 only a "de minimis" effect on interstate commerce is required  
20 to meet RICO's jurisdictional element. Fernandez, 388 F.3d at  
21 1218. It is the activities of the enterprise, not each  
22 predicate act, which must affect interstate commerce. United  
23 States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981); Rone,  
24 598 F.2d at 573. Here, the requisite effect on interstate  
25 commerce will be established by evidence that one of the  
26 enterprise's primary activities was to engage in, and to  
27 encourage, narcotics trafficking, including trafficking in  
28 cocaine, methamphetamine, and marijuana. See United States v.

1 Alvarez, 860 F.2d 801, 820 (7th Cir. 1988) (trafficking in  
2 heroin which comes from Mexico satisfies RICO interstate  
3 commerce requirement).

4       3. Pattern of Racketeering Activity

5       In order to establish that the affairs of the enterprise  
6 were conducted through a pattern of racketeering activity, it  
7 is sufficient that the government demonstrate that "the  
8 predicate offenses are related to the activities of th[e]  
9 enterprise." United States v. Scotto, 641 F.2d 47, 54 (2d  
10 Cir. 1980).

11       4. RICO Conspiracy

12       Section 1962(d) makes it a separate crime to conspire to  
13 commit a violation of Section 1962(c). A violation requires  
14 proof that there was an agreement among the co-conspirators to  
15 conduct or participate in the affairs of an enterprise.

16 Salinas v. United States, 118 S. Ct. 469, 476-78 (1997). It  
17 does not require an agreement by each co-conspirator to commit  
18 at least two racketeering acts. Id.

19       B. LAW RELATING TO CONSPIRACIES IN GENERAL

20       1. Participation in the Conspiracy

21       The government must show that a conspiracy between at  
22 least two people existed and that the defendant was a member  
23 of the conspiracy charged. See, e.g., United States v. Reese,  
24 775 F.2d 1066, 1071 (9th Cir. 1985). Once a conspiracy is  
25 proven, evidence establishing beyond a reasonable doubt the  
26 defendant's connection to that conspiracy - even if the  
27 connection is slight - is sufficient to convict him of  
28 knowingly participating in the conspiracy. See, e.g., United

1     States v. Stauffer, 922 F.2d 508, 514-515 (9th Cir. 1990).  
2     Every member of a conspiracy need not know every other member  
3     nor be aware of all acts committed in furtherance of the  
4     conspiracy. See, e.g., United States v. Taren-Palma, 997 F.2d  
5     525, 530 (9th Cir. 1993).

6           2. Co-conspirator Declarations

7     Declarations by one co-conspirator during the course of  
8     and in furtherance of the conspiracy may be used against  
9     another conspirator because such declarations are not hearsay.  
10    See Fed. R. Evid. 801(d)(2)(E). Further, statements made in  
11    furtherance of a conspiracy were expressly held by the Supreme  
12    Court in Crawford v. Washington, 541 U.S. 36, 56 (2004) to be  
13    “not testimonial” such that their admission does not violate  
14    the Confrontation Clause. As such, the admission of co-  
15    conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E)  
16    requires only a foundation that: (1) the declaration was made  
17    during the life of the conspiracy; (2) it was made in  
18    furtherance of the conspiracy; and (3) there is, including the  
19    co-conspirator's declaration itself, sufficient proof of the  
20    existence of the conspiracy and of the defendant's connection  
21    to it. See also, Bourjaily v. United States, 483 U.S. 171,  
22    173, 181 (1987). The government must prove by a preponderance  
23    of the evidence that a statement is a co-conspirator  
24    declaration in order for the statement to be admissible under  
25    Rule 801(d)(2)(E). Bourjaily, 483 U.S. at 176; United States  
26    v. Crespo de Llano, 838 F.2d 1006, 1017 (9th Cir. 1987).  
27    Whether the government has met its burden is to be determined  
28    by the trial judge, and not the jury. United States v.

1 Zavala-Serra, 853 F.2d 1512, 1514 (9th Cir. 1988).

2 The foundation for the admission of a co-conspirator  
3 statement may be established before or after the admission of  
4 the statement. If a proper foundation has not yet been laid,  
5 the court may nevertheless admit the statement, but with an  
6 admonition that the testimony will be stricken should the  
7 conspiracy not be proved. United States v. Arbelaez, 719 F.2d  
8 1453, 1469 (9th Cir. 1983); United States v. Kenny, 645 F.2d  
9 1323, 1333-1334 (9th Cir. 1981).

10 It is not necessary that the defendant was present at the  
11 time the statement was made. Sendejas v. United States, 428  
12 F.2d 1040, 1045 (9th Cir. 1970). Once the existence of the  
13 conspiracy is established, only "slight evidence" is needed to  
14 connect the defendant and declarant to it. Crespo De Llano,  
15 838 F.2d at 1017. The declaration itself, together with  
16 independent evidence, may constitute sufficient proof of the  
17 existence of the conspiracy and the involvement of the  
18 defendant and declarant in it. Bourjaily, 483 U.S. at 181.

19 The term "in furtherance of the conspiracy" is construed  
20 broadly to include statements made to "induce enlistment or  
21 further participation in the group's activities," to "prompt  
22 further action on the part of conspirators," to "reassure  
23 members of a conspiracy's continued existence," to "allay a  
24 coconspirator's fears," and to "keep coconspirators abreast of  
25 an ongoing conspiracy's activities." United States v.  
26 Yarborough, 852 F.2d 1522, 1535-1536 (9th Cir. 1988) (citing  
27 cases). Statements made with the intent of furthering the  
28 conspiracy are admissible whether or not they actually result

1 in any benefit to the conspiracy. United States v. Williams,  
2 989 F.2d 1061, 1068 (9th Cir. 1993). Co-conspirator  
3 declarations can be made to government informants and  
4 undercover agents. See, e.g., United States v. Zavala-Serra,  
5 853 F.2d 1512, 1516 (9th Cir. 1988) (agents); United States v.  
6 Tille, 729 F.2d 615, 620 (9th Cir. 1984) (informants). In  
7 addition, "[i]n determining whether a statement is made 'in  
8 furtherance of' a conspiracy, the court looks to the  
9 declarant's intent in making the statement, not the actual  
10 effect of the statement." Williams, 989 F.2d at 1068.

11 Courts have found the following to be statements "in  
12 furtherance of the conspiracy": (a) statements made to induce  
13 enlistment in the conspiracy (United States v. Arias-  
14 Villanueva, 998 F.2d 1491, 1502 (9th Cir. 1993)); (b)  
15 statements made to keep a conspirator abreast of a  
16 co-conspirator's activity, or to induce continued  
17 participation in a conspiracy, or to allay the fears of a  
18 co-conspirator (Arias-Villanueva, 998 F.2d at 1502); (c)  
19 statements made to prompt action in furtherance of the  
20 conspiracy by either of the participants to the conversation  
21 (United States v. Layton, 720 F.2d 548, 556 (9th Cir. 1983));  
22 (d) statements related to the concealment of the criminal  
23 enterprise (Tille, 729 F.2d at 620); (e) statement identifying  
24 another co-conspirator as a source for the drugs to be sold to  
25 purchaser (United States v. Lechuga, 888 F.2d 1472, 1480 (5th  
26 Cir. 1989)); (f) "puffing," boasts and other conversation  
27 designed to obtain the confidence of another conspirator (or  
28 apparent conspirator who actually was an undercover agent)

1 (United States v. Santiago, 837 F.2d 1545, 1549 (11th Cir.  
2 1988) ("bragging" and boasts by co-conspirator admissible in  
3 defendant's trial as statements in furtherance of conspiracy);  
4 United States v. Miller, 664 F.2d 94, 98 (5th Cir. 1981)  
5 ("[p]uffing, boasts, and other conversations . . . are  
6 admissible when used by the declarant to obtain the confidence  
7 of one involved in the conspiracy."); and (g) statements  
8 recounting the co-conspirator's past criminal activities  
9 (United States v. Esacove, 943 F.2d 3, 5 (5th Cir. 1991);  
10 (United States v. McLernon, 746 F.2d 1098, 1105-06 (6th Cir.  
11 1984) (holding that there is no requirement that co-  
12 conspirator have personal knowledge of his statements and  
13 admitting co-conspirator's statements that he had been in the  
14 cocaine business for 20 years and worked with other defendants  
15 as in furtherance of conspiracy)).

VI.

## EVIDENTIARY ISSUES

A. EXPERT TESTIMONY

19 If specialized knowledge will assist the trier of fact in  
20 understanding the evidence or determining a fact in issue, a  
21 qualified expert witness may provide opinion testimony on the  
22 issue in question. Fed. R. Evid. 702. An expert's opinion  
23 may be based on hearsay or facts not in evidence, where the  
24 facts or data relied upon are of the type reasonably relied  
25 upon by experts in the field. Fed. R. Evid. 703. An expert  
26 may provide opinion testimony even if it embraces an ultimate  
27 issue to be decided by the trier of fact. Fed. R. Evid. 704.  
28 The court has broad discretion to determine whether to admit

expert testimony. United States v. Andersson, 813 F.2d 1450, 1458 (9th Cir. 1987).

The government anticipates calling numerous expert witnesses in this case. In compliance with the Court's order, the government filed on August 13, 2009 a complete list of its expert witnesses and an offer of proof regarding their testimony.

B. CROSS EXAMINATION OF DEFENDANT'S CHARACTER WITNESSES

On cross-examination of defendant's character witnesses, the government may inquire into specific instances of defendant's past conduct relevant to the character trait at issue. Fed. R. Evid. 405(a); Michelson v. United States, 335 U.S. 469, 479 (1948).

VII.

## CONCLUSION

The government respectfully requests leave to file supplemental memoranda as may become necessary during trial.

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